21-_____

IN THE
Supreme Court of the United States

DANIEL BIERBACH,
Petitioner,

v.

DIGGER'S POLARIS AND
STATE AUTO/UNITED FIRE & CASUALTY GROUP,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

MICHAEL G. SCHULTZ
MICHAEL SCHULTZ LAW FIRM
330 Second Avenue South
Suite 100
Minneapolis, MN 55401
(612) 412-4916

DAVID C. FREDERICK
Counsel of Record
THOMAS G. SCHULTZ
DANIEL S. SEVERSON
CATHERINE M. REDLINGSHAFER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

Counsel for Petitioner

January 11, 2022

QUESTION PRESENTED

Whether the Controlled Substances Act preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury.

PARTIES TO THE PROCEEDINGS

Petitioner Daniel Bierbach was the employee in the proceedings before the Office of Administrative Hearings for Workers' Compensation; the respondent in the proceedings before the Workers' Compensation Court of Appeals; and the respondent in the proceedings before the Supreme Court of Minnesota.

Respondents Digger's Polaris and State Auto/ United Fire & Casualty Group were the employer and insurer, respectively, in the proceedings before the Office of Administrative Hearings for Workers' Compensation; the appellants in the proceedings before the Workers' Compensation Court of Appeals; and the relators in the proceedings before the Supreme Court of Minnesota.

RELATED PROCEEDINGS

The Supreme Court of Minnesota addressed the same question of preemption at issue here in a companion case, *Musta v. Mendota Heights Dental Center*, 965 N.W.2d 312 (Minn. Oct. 13, 2021) (No. A20-1551), and rendered judgment in the case under review here for the reasons stated in the *Musta* opinion, which was issued on the same day. On November 4, 2021, Susan K. Musta filed a petition for a writ of certiorari in this Court seeking review of the decision in her case. That petition was docketed as No. 21-676.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER MATERIALS

Petitioner Daniel Bierbach petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case.

INTRODUCTION

This petition presents the same question already pending before this Court in *Musta v. Mendota Heights Dental Center*, No. 21-676 (pet. docketed Nov. 5, 2021): whether the Controlled Substances Act ("CSA") preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury.

In the decision below, the Minnesota Supreme Court held that the CSA preempts the workers' compensation court order mandating reimbursement for petitioner's medical cannabis. The decision below adopted the reasoning laid out in the *Musta* opinion, a companion case in which the Minnesota Supreme Court reached the same conclusion.

Accordingly, petitioner respectfully requests that the Court hold this petition pending its forthcoming decision in *Musta*. And for the reasons explained in the *Musta* petition, the Court should grant that petition and rule on the merits that the CSA does not preempt a state workers' compensation order requiring reimbursement for the cost of medical marijuana to treat a work-related injury. The Court then should grant the petition in this case and dispose of it in a manner consistent with its ruling in *Musta*. If the Court does not grant the petition in *Musta*, it should grant the petition in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota in *Bierbach v. Digger's Polaris* (App. 1a-28a) is reported at 965 N.W.2d 281. The opinion of the Supreme Court of Minnesota in the companion case of *Musta v. Mendota Heights Dental Center* (App. 29a-69a) – on which the court specifically relied in reaching its decision in *Bierbach* – is reported at 965 N.W.2d 312. The opinion of the Workers' Compensation Court of Appeals of Minnesota (App. 70a-81a) is not reported. The findings and order of the Office of Administrative Hearings for Workers' Compensation (App. 82a-91a) are not reported.

JURISDICTION

The Supreme Court of Minnesota entered its judgment on October 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

---

[1] Because the constitutionality of a state statute is drawn into question in this case, 28 U.S.C. § 2403(b) is potentially implicated. Pursuant to this Court's Rules 14.1(e)(v) and 29.4(c), petitioner therefore is notifying the Court that he is serving this petition on the Attorney General of Minnesota.

Relevant provisions of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), the Medical Cannabis Therapeutic Research Act, Minn. Stat. § 152.21 *et seq.*, and the Minnesota Workers' Compensation Act, Minn. Stat. § 176.001 *et seq.*, are reproduced at App. 93a-129a.

STATEMENT

A. Statutory History

The CSA categorizes controlled substances according to five schedules. *See* 21 U.S.C. § 812(a). A "Schedule I" substance – the most restrictive level – has a high potential for abuse, does not have currently accepted medical use in treatment, and lacks accepted safety for use under medical supervision. *See id.* § 812(b)(1). Since the CSA's enactment in 1970, marijuana has been a Schedule I substance. *See id.* § 812(c), Schedule I (c)(10). As a result, under the CSA, "the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. §§ 823(f), 841(a)(1), 844(a)).

"The CSA explicitly contemplates a role for the States in regulating controlled substances . . . 'unless there is a positive conflict'" between the CSA and state law "'so that the two cannot consistently stand together.'" *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006) (quoting 21 U.S.C. § 903).

Since enactment of the CSA, several States have legalized medicinal marijuana. In fact, 47 States

currently permit the use of marijuana or related substances for medical purposes.[2]

Recognizing this changing landscape, Congress recently has prohibited the U.S. Department of Justice ("DOJ") from impeding state medical marijuana programs. Specifically, in appropriations bills since 2014, Congress consistently has barred DOJ from expending funds to "prevent" States "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *E.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020) (App. 109a).

Minnesota authorized the use of marijuana for medical purposes in 2014 with the Medical Cannabis Therapeutic Research Act (the "Cannabis Act"). *See* Minn. Stat. §§ 152.21-152.37. Under the Cannabis Act, the Minnesota Department of Health administers a program that permits certain registered patients to possess marijuana for medical purposes.

A patient is eligible for the program only if he or she is diagnosed with a qualifying medical condition expressly identified in the statute, such as cancer with certain severe symptoms, or permitted by the Minnesota Commissioner of Health. *See* Minn. Stat. § 152.22, subd. 14. Effective in 2016, the Commissioner deemed "intractable pain" a qualifying medical condition. App. 4a (citing 45 Minn. Reg. 1299 (June 14, 2021).

After receiving a qualifying diagnosis from his or her health care practitioner, the patient must apply to the Minnesota Department of Health to participate

---

[2] *See* Nat'l Conf. of State Legislatures, State Medical Marijuana Laws (Jan. 4, 2022) (surveying state medical marijuana laws), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

in the program. *See* Minn. Stat. § 152.27, subd. 3(a) (App. 112a-113a). If approved, the Department issues a registry verification to the patient, the patient's health care practitioner, and the manufacturer, which allows the manufacturer to supply the marijuana to the patient subject to final approval by a licensed pharmacist. *See id.* § 152.27, subd. 6 (App. 115a-116a); *id.* § 152.29, subd. 3. To remain enrolled in the program, a patient must submit each year a doctor's certification of a qualifying medical condition. *See id.* § 152.27, subd. 3(b) (App. 113a).

Minnesota's workers' compensation statute provides that, if an employee sustains an injury at work, "[t]he employer shall furnish any medical . . . treatment, including . . . medicines . . . as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." *Id.* § 176.135, subd. 1 (App. 117a-118a).

B. Factual And Procedural History

In 2004, petitioner Daniel Bierbach suffered a work-related ankle injury from an all-terrain vehicle he was driving while employed by respondent Digger's Polaris.[3] As a result of the injury, petitioner underwent surgery and participated in physical therapy. But these measures were not enough to heal his ankle or to quell the pain. His doctor stated that he would need ankle replacement surgery but that he was too young for such a procedure. Over the next 15 years, petitioner tried various treatments – including cortisone ankle injections, ankle braces and boots, and anti-inflammatory medications. App. 5a. But petitioner's ankle continued to deteriorate, and the pain persisted. Indeed, it worsened.

---

[3] The other respondent, State Auto/United Fire & Casualty Group, is Digger's Polaris's insurer. App. 5a n.2.

In April 2018, petitioner's doctor certified him as having intractable pain.[4] At that point, petitioner enrolled in Minnesota's medical cannabis program and began purchasing medical cannabis. App. 6a. Petitioner requested reimbursement from his former employer for the cost of the medical marijuana. The former employer (and its insurer) refused, arguing, among other things, that the CSA preempted an order requiring reimbursement for medical marijuana.

A workers' compensation judge reserved the federal preemption question "for a court of competent jurisdiction" and ordered reimbursement under Minnesota's Workers' Compensation Act, finding that medical marijuana was a reasonable and necessary medical treatment. App. 86a-92a. The Workers' Compensation Court of Appeals held that it, too, lacked jurisdiction to decide questions of federal law and otherwise affirmed the order of the workers' compensation judge. App. 71a, 81a.

A divided Minnesota Supreme Court reversed. The court noted that it "addressed the same question[] of . . . preemption in a companion case, *Musta v. Mendota Heights Dental Center*," and adopted the reasoning set forth in that opinion. App. 2a. Specifically, the court below held – based on *Musta* – that "the CSA

---

[4] Under Minnesota's workers' compensation rules, "intractable pain" means "a pain state in which the cause of the pain cannot be removed or otherwise treated with the consent of the patient and in which, in the generally accepted course of medical practice, no relief or cure of the cause of the pain is possible, or none has been found after reasonable efforts." Minn. Stat. § 152.125, subd. 1; *see* Minn. R. 5221.6040, subp. 8a (incorporating the definition from Section 152.125, subdivision 1).

preempts the compensation court's order mandating relators to pay for Bierbach's medical cannabis." *Id.*[5]

As discussed in the *Musta* petition, *see* Pet. 20, No. 21-676, the Minnesota Supreme Court reasoned in *Musta* that the CSA preempted an order "obligat[ing] an employer to reimburse an employee for the cost of medical cannabis because compliance with that order would expose the employer to criminal liability under federal law for aiding and abetting Musta's unlawful possession of cannabis." App. 30a.

Justice Chutich dissented in part "[f]or the reasons set forth in" her partial dissent in *Musta*. App. 3a (Chutich, J., concurring in part, dissenting in part).[6] In a comprehensive rebuttal in that case, she explained that the majority's "conclusion that a conflict of law exists rests on an unduly expansive view of aiding and abetting liability, with the result of denying injured employees reasonable and necessary medical treatment." App. 55a. Justice Chutich further concluded below that the majority's decision "overextends the preemptive reach of federal law and denies Bierbach reimbursement for the best means of managing his painful, work-related injury while staying meaningfully employed." App. 28a.[7]

---

[5] As in *Musta*, in the decision below, the Minnesota Supreme Court affirmed the determination that the Workers' Compensation Court of Appeals lacked authority to resolve questions of federal law. App. 2a.

[6] As in *Musta*, in her opinion below, Justice Chutich agreed with the majority's view that the Workers' Compensation Court of Appeals lacked jurisdiction to decide the question of federal law. App. 3a (Chutich, J., concurring in part, dissenting in part).

[7] Having concluded that a reimbursement order is "*not* preempted," Justice Chutich would have reached "the remaining issues, which were not present in *Musta*," because the parties in

REASONS FOR GRANTING THE PETITION

This Court already is considering whether to grant certiorari in *Musta v. Mendota Heights Dental Center*, No. 21-676 (pet. docketed Nov. 5, 2021), which presents the identical question presented in this petition: whether the CSA preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury. The opinions below – majority and dissent – adopted their reasoning in *Musta*. This Court should therefore hold this petition pending its decision in *Musta* and dispose of this case in a manner consistent with its ruling in that case.

I. The Minnesota Supreme Court's Holding Entrenches A Mature Split Among State Supreme Courts And Is Erroneous

A. State Supreme Courts Are Divided

State supreme courts are divided – 2 to 2 – on whether the CSA preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury. Only this Court can resolve this split in authority.

As explained in greater detail in *Musta*, *see* Pet. 16-21, No. 21-676, four state supreme courts have issued conflicting decisions regarding the question of federal

---

Musta "stipulated that medical cannabis was reasonable and necessary to treat the employee's pain." App. 3a & n.1 (Chutich, J., concurring in part, dissenting in part); *see also Musta*, App. 31a (majority). Justice Chutich then concluded that petitioner's expert medical opinion had adequate foundation and that substantial evidence supported the finding that medical cannabis is reasonable and necessary to treat petitioner's intractable pain. App. 11a-28a (Chutich, J., concurring in part, dissenting in part).

preemption presented here. The supreme courts of Maine and Minnesota have held – over dissents – that the CSA preempts an order under their States' workers' compensation laws requiring reimbursement for medical marijuana. *See Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 12 (Me. 2018); *Musta v. Mendota Heights Dental Ctr.*, 965 N.W.2d 312, 327 (Minn. 2021) (App. 54a); *Bierbach v. Digger's Polaris*, 965 N.W.2d 281, 282 (Minn. 2021) (App. 2a). But the supreme courts of New Hampshire and New Jersey have reached the opposite conclusion with respect to their States' medical marijuana laws. *See Appeal of Panaggio*, 260 A.3d 825, 835, 837 (N.H. 2021); *Hager v. M&K Constr.*, 247 A.3d 864, 887, 889 (N.J. 2021).

These decisions manifest a mature split of authority that warrants review now. In *Musta*, and thus in the decision below, the Minnesota Supreme Court "agree[d] with the reasoning set forth by the Maine Supreme Judicial Court in *Bourgoin*," but acknowledged that "[t]wo state supreme courts have reached a different conclusion." App. 45a-46a. These courts carefully have considered the extensive arguments on this pure legal question of federal preemption. Although the question likely will recur in other jurisdictions with state workers' compensation programs that cover medical marijuana, *see Musta* Pet. 21-22, No. 21-676, additional percolation is unnecessary. With two state supreme courts on each side of the question presented, the split will not go away absent this Court's intervention.

B. The Decision Below Is Incorrect

The Minnesota Supreme Court erred in holding that the CSA preempts a state workers' compensation order requiring reimbursement for medical marijuana. As Justice Chutich systematically explained in her

dissent in *Musta*, which she adopted in her dissent below, the order is not preempted.

The source of federal preemption is the Supremacy Clause of the U.S. Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The CSA includes a preemption provision: the Act preempts a state law when "there is a positive conflict between" a provision of the Act and the state law "so that the two cannot consistently stand together." 21 U.S.C. § 903.

Here, there is no "positive conflict" between the CSA and the order under Minnesota's workers' compensation law to reimburse petitioner's medical marijuana costs. The Act makes it "unlawful to manufacture, distribute, dispense, or possess any controlled substance," including marijuana. *Gonzales v. Raich*, 545 U.S. 1, 13 (2005) (citing 21 U.S.C. §§ 841(a)(1), 844(a)); *see also* 21 U.S.C. § 812(c), Schedule I (c)(10). Meanwhile, Minnesota authorizes the use of marijuana for medical purposes, and Minnesota workers' compensation law provides that "[t]he employer shall furnish any medical . . . treatment, including . . . medicines." Minn. Stat. § 176.135, subd. 1 (App. 117a-118a). These laws are not irreconcilable. A reimbursement order under Minnesota's workers' compensation law does not require the employer to possess, manufacture, or distribute marijuana in contravention of the CSA. And the Act does not prohibit an employer or insurer from reimbursing an employee for his purchase of medical marijuana.

The Minnesota Supreme Court nevertheless concluded that the CSA preempts the workers' compensation order below, reasoning that compliance with the order would be a federal crime – specifically, aiding and abetting possession of marijuana under 18 U.S.C. § 2. *See Musta*, App. 53a. That was error.

As Justice Chutich observed in her dissent in *Musta*, which she adopted in the decision below, *see* App. 55a-66a (Chutich, J., concurring in part, dissenting in part), the conclusion "that a conflict of law exists rests on an unduly expansive view of aiding and abetting liability, with the result of denying injured employees reasonable and necessary medical treatment," App. 55a. And as explained in greater detail in *Musta*, *see* Pet. 26-30, No. 21-676, an employer's compliance with a workers' compensation order to reimburse medical marijuana does not satisfy either element of aiding-and-abetting liability: the employer does not satisfy the affirmative-act requirement, because marijuana possession was complete by the time of reimbursement, and does not have the requisite intent, because it merely would comply with a reimbursement order and at most incidentally facilitate the possession. *See Rosemond v. United States*, 572 U.S. 65, 71 (2014).

Finally, obstacle preemption does not prevent enforcement of the workers' compensation order below. Here, state workers' compensation orders reimbursing medical marijuana do not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In fact, Congress has passed appropriations bills with riders that bar DOJ from enforcing federal marijuana laws in connection with medical marijuana programs that comply with state law. *See*, *e.g.*, Consolidated Appropriations Act, 2021,

Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020) (App. 109a). As the dissent recognized in *Musta*, and adopted below, "[t]hese appropriation riders at the very least show that Congress has chosen to 'tolerate' the tension between state medical cannabis laws and the Controlled Substances Act." App. 68a (Chutich, J., concurring in part, dissenting in part). In such circumstances, "[t]he case for federal pre-emption is particularly weak." *Wyeth*, 555 U.S. at 575 (citation omitted).

Moreover, while "the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of" controlled substances, *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006), as the dissent in *Musta* also recognized, it does not "purport to regulate insurance practices in any manner," App. 68a (Chutich, J., concurring in part, dissenting in part). As a result, "obstacle preemption is not met." *Id.*

II. The Court Should Hold This Petition Pending Resolution Of *Musta*

This Court should hold this petition pending its decision in *Musta*. To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issues as other cases pending before it and, once the related case is decided, resolves the held petitions in a consistent manner. *See*, *e.g.*, *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) ("We have GVR'd in light of a wide range of developments, including our own decisions[.]"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided.").

That procedure is particularly appropriate here, because the Minnesota Supreme Court expressly relied on *Musta* in reaching the decision in the companion case below. *See* App. 2a ("[w]e addressed the same question[] of . . . preemption in [*Musta*]" and "[f]or the reasons stated in that opinion . . . [w]e also hold that the CSA preempts the compensation court's order mandating relators to pay for Bierbach's medical cannabis"); *see also* App. 10a (dissent explaining that "I disagree with the court that federal law preempts the reimbursement order" and "my reasoning . . . is set forth in my concurrence and dissent in *Musta*").

Because this petition raises the same question of federal preemption at issue in *Musta*, the Court should follow its usual practice here to ensure that this petition is resolved in a consistent manner.

CONCLUSION

The Court should hold this petition pending its disposition of *Musta*; if the Court chooses not to grant the petition in *Musta*, it should grant this petition.

Respectfully submitted,

MICHAEL G. SCHULTZ
MICHAEL SCHULTZ LAW FIRM
330 Second Avenue South
Suite 100
Minneapolis, MN 55401
(612) 412-4916

DAVID C. FREDERICK
Counsel of Record
THOMAS G. SCHULTZ
DANIEL S. SEVERSON
CATHERINE M. REDLINGSHAFER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

Counsel for Petitioner

January 11, 2022